

**MINUTES  
HAMPTON ZONING BOARD OF ADJUSTMENT  
THURSDAY, JULY 20, 2006**

**MEMBERS PRESENT:** Robert V. Lessard, Chairman  
Tom McGuirk, Vice-Chairman  
Bill O'Brien, Clerk  
Matt Shaw  
Jack Lessard, Alternate (sits for first & second petition only)  
Bryan Provencal, Alternate (sits for 34-06 forward)

**OTHERS PRESENT:** Angela Silva, Recording Secretary

The Chairman called the meeting to order at 7:00 p.m. and led the Pledge of Allegiance to the Flag.

He then called for review and approval of the minutes of June 15, 2006. Mr. O'Brien made a correction to Page 1, he is the Clerk, and to Page 7, the last petition. The response to the 5 criteria was 2 yeses, Mssrs. Shaw and McGuirk, and 3 no's, including himself. Also for the motion, he seconded for the purpose of a vote.

Mr. Jack Lessard MOVED to approve the minutes as corrected, SECONDED by Mr. O'Brien.

VOTE: 5 For, 0 Oppo

MOTION PASSES.

The Chairman announced that Petitions #35-06 – 58 Brown Avenue and #38-06 – 54 Tide Mill Road have asked to be withdrawn from the agenda this evening.

Mr. O'Brien MOVED to allow Petitions #35-06 and #38-06 to withdraw without prejudice, SECONDED by Mr. Shaw.

VOTE: 5 For, 0 Oppo

MOTION PASSES.

The Chairman then announced that the Town Attorney has asked him to allow the Town Attorney to ask the court to postpone the case regarding the Victoria Inn on High Street that was supposed to occur at the end of the month.

Mr. Jack Lessard MOVED to allow the postponement of the High Street case, SECONDED by Mr. Shaw.

VOTE: 5 For, 0 Oppo

MOTION PASSES.

**33-06** The petition of Richard and Janice Clermont for property located at 515 Winnacunnet Road #6 seeking relief from Articles 1.3, 2.3.4(B) and 8.2.3 to add a 10'x18' screened porch on existing building within 50 feet of tidal marsh. This property is located at Map 222, Lot 118 in a RB zone.

Mr. Richard Clermont came to the table to speak on the petition. He said he would like to add a porch on the west side of his cottage as shown on his plans. He said other units within the condo complex have built similar additions.

*Questions from the Board:*

Mr. Vic Lessard asked if the NH Wetlands Board and Conservation Commission have to look at this. Mr. Clermont responded no.

Mr. O'Brien asked someone to clarify how 2.3.4 works. Mr. Schultz explained that he has to go to the State Wetlands Board if he is within 100 feet of wetlands and to the Conservation Commission if he is within 50 feet. Mr. O'Brien asked Mr. Clermont how close he is?

He responded 25 feet.

Mr. O'Brien asked Mr. Schultz to confirm that if this Board approves this, the petitioner still needs 2 more approvals. Mr. Schultz responded yes, he'll need a Special Permit locally and a State of NH Wetlands permit.

Mr. Lessard added that if we approve this petition it will have to be subject to all boards.

Mr. Shaw confirmed that there is a letter in the file from the condo association. He then asked if it will be a screened porch? Mr. Clermont said yes, no windows.

*Comments from the Audience:* None.

*Back to the Board:*

Mr. Clermont read through the 5 criteria as submitted with his petition.

Mr. Shaw asked what type of flooring there will be within this porch. Mr. Clermont responded wood decking.

The Chairman polled the Board on their satisfaction that the 5 criteria have been met. All members agreed that they have.

Mr. O'Brien MOVED to grant the petition subject to approvals being obtained from the Hampton Conservation Commission and any other boards necessary, and that this is strictly a screened porch, not heated and with no windows, SECONDED by Mr. McGuirk.

VOTE: 5 For, 0 Oppo

PETITION GRANTED.

34-06 The petition of The Ocean Club LLC for property located at 703 Ocean Boulevard seeking an Equitable Waiver of Dimensional Requirements to leave in place the existing elevator overrun and lighthouse metal roof where each exceed the maximum height for this zone of fifty (50) feet. This property is located at Map 235, Lot 9 in a BS zone.

Mr. Vic Lessard leaves the Board, Mr. McGuirk sits in as Chair. Mr. Provencal now sits on the Board.

Atty. Steve Ells and Randall Radkay, Principle of Ocean Club, LLC, came to the table to speak on the petition. Also builder Mike Wicher was in the audience.

Mr. Ells explained that when the elevator override and the metal dome on the lighthouse were completed, they were asked by the Building Department to get a legal height completed by a surveyor. At that time Millenium Engineering calculated 10.5" above the 50 feet maximum at the highest point at the elevator override at rough grade and 8.5" at the metal dome. We then applied for the equitable waiver as a precaution in case final grade did allow for these items. The final elevations by Millenium show the lighthouse dome at 6.12 inches over and the elevator override at

8.04 inches over the 50 foot maximum. He then distributed revised plans illustrating the final number. The building itself is well within the maximum at 47.42', he said. It's the mechanicals and the decorative elements that run above. There are primarily 4 elements to meet he said, when asking for an Equitable Waiver. This was not noticed until this building was substantially completed, when Kevin came out and asked us to have the height determined. This is not a result of ignorance of the law, but was a good faith error in measurement. The building is built exactly as approved. We think it had something to do with the installation of the foundation. The violations do not constitute a public or private nuisance nor do they diminish the value of the other properties. They are technical and slight, unseen and virtually unnoticeable. He distributed 6 photographs of the building taken from various distances all around the building along with a tax map of the locations where the photos were taken from. You can't even see the zoning violation until up at 5<sup>th</sup> or 6<sup>th</sup> Street, he said.

The cost to correct these violations so far outweighs any public benefit to be gained that it would be unfair or unequitable to require it to be corrected. We would need a large crane to dismantle this and would have to remove a row of blocks. The roof is on and sealed. We'd have to take down the lighthouse dome and reconstruct it. This would be a substantial cost with minimal public benefit. We firmly believe that this situation qualifies for the Equitable Waiver. We satisfy the 4 elements. This was not intentional and we didn't gain anything with these violations

*Questions from the Board:*

Mr. O'Brien asked how they determined the average grade? Mr. Radkay explained the 16 areas where grade plane's were taken and then averaged on the plan. Mr. Ells said he calculated the tenths of feet noted on the plan to inches.

Mr. O'Brien said the 9.5 and 9.8 elevations at the SW corner are not true. The lot sloped. This is not the natural topography that was there. There must be buildup of some sort.

Mr. Radkay said he's putting in a boundary wall because he can't use Kings Highway as an ingress or egress per his approved site plan. He has raised that area about 1-1/2 feet on the south side in order to accommodate drainage.

Mr. O'Brien asked about the north side. Mr. Radkay said that's pretty close to the original, within inches. The front is close to as it always was. There was a 2 inch differential, net effect with the regrading.

Mr. Radkay went on to say that he was originally 10 inches over, prior to hottop. The front is the same as it always was. The rear is pretty close to the same.

Mr. O'Brien commented that the plans show 49'8" to the top of the elevator shaft. You had 4 inches to play with.

Mr. Radkay said there is a 10 foot clearance in the garage.

Mr. O'Brien said that had you not had the numbers 9.8, 9.8 and 9.5 you would've exceeded the 50 foot height when you put the original plans in.

Mr. Radkay the original grade was there and the first floor was set. This is probably where the error occurred. The floor is at elevation 10 feet.

Mr. O'Brien said the original plan was not showing the true average grade. Had you performed the grade level plane in accordance with the rules and procedures of this Town you would've been over the height limit. You deprived the people from coming in and voicing their opinion.

Mr. Radkay said he doesn't agree. The plans were reviewed many times with the Building Department, Wicher Builders, our engineer, your engineer. This building was built entirely without a variance. This was not intentional. Do you think we would build a building of this stature and build knowing we're going to go over the limit.

Mr. O'Brien – so you used the first floor elevation at 10 feet as your average, not 6 feet out.

Mr. Schultz said that had the topo and elevations shown on the approved site plan with the proposed building elevations been in accordance with town procedures he would've gone above the 50 feet. The proposal showed the building under 50 feet height requirements and it was permitted based on a number of conditions. Therefore, we're here tonight. I asked for certified elevations, this is when this was discovered.

Mr. O'Brien reiterated that on the site plan that was submitted, had the proper height determination procedures been followed, he would've exceeded the 50 feet.

Mr. Ells said so we've discovered how the problem occurred and added that this got by everybody. This 6-8" over was not intentional or in bad faith.

Mr. O'Brien asked that he was saying that their original calculation process was flawed.

Mr. Ells said you're saying that. Millenium Engineering and Ambit Engineering (the Planning Board's engineer) both didn't catch it. He said he was with this process from day one and he doesn't remember any problems with the plans.

Mr. O'Brien asked for the original sight plan drawings.

Mr. Ells had some plans but he wasn't sure they were the final set.

*Comments from the Audience:*

Mr. Hube McQuade, 12 Kings Hwy, talked about abutting lot's approval and not discovering the deed restrictions until late in the process. He asked if the flag on the north side of the property was the property line. He was concerned with that setback.

Mr. Radkay responded he didn't think so. Once the foundation was poured and a survey was completed, it showed we were within the setbacks.

Mr. McQuade commented that the building is 49 feet high on the west and north sides. The south side was raised 2 ½ feet. He saw the meetings where Mr. Gillick asked if he were going over the 50 foot height limit even with the top of the lighthouse. He said no. He asked if the sidewalk on the front of the building is being replaced and commented on the color of the building.

Mr. Radkay said he will replace the sidewalk. The State repaved and dumped water on his lot. He is working with the State and is going to create a lip to keep the water going by the property.

Dino Pantelis, 2 Kings Hwy #6, said he hired Altis Engineering of Portsmouth, when this project was proposed and they noted concerns with the elevator override and lighthouse exceeding the 50 feet. He also spoke of changes to the appearance of the building through the process. He did not go to DOT for permitting because no grading was required in the R.O.W., now he's going through the process with DOT for a driveway permit. The original proposal was for feet to the north. The lot slopes down to the south, this causes the grade plane average to change maybe. This would've been very different in scope, size and density had it come before the ZBA. Had our engineers and

abutters been able to speak about the 50 foot height and the grading, maybe 6.2 and 7.7 would've been looked at.

No further comments.

*Back to the Board:*

Mr. O'Brien clarified that the plan does show 49'8" from the top of slab at the first floor to the top of the elevator shaft. There was only 4 inches to play with. In addition, the lot slopes over 2 feet from front to back. Thus the original height determination was flawed. The petitioner has to satisfy all 4 elements. One element is to show the violation was not an outgrowth of ignorance of the ordinance, but they didn't follow established procedures. If they weren't aware, then they were ignorant of the ordinance. They didn't follow Town procedures. Then it shouldn't be approved.

Mr. Ells said if they knew they would've fixed it. Mr. O'Brien may be right as to how it occurred, he said. We didn't see it, nor did anyone else, he said. Only at the 11<sup>th</sup> hour when we did the final grade check did we find out we were over. We can fix it. It will cost a lot of money, but it can be done.

Mr. O'Brien asked when the membrane went on? Mr. Radkay said 2 weeks before Mother's day. He said he used what he considered to be the best of the best for a builder. Mr. Wicher built the police station and Millenium Engineering, Henry Boyd, who has surveyed all over the area. He didn't know it. Maybe he should have known it, but he didn't. He's not very comfortable about coming here. But he would have come here if he needed to in the beginning. It was an honest mistake. There are 72 pilings drilled 68 feet into the ground. This building is first class from top to bottom. This is a 6 or 7 inch problem. It's an honest mistake. We're entitled to this waiver in our opinion.

Mr. McGuirk agrees with Bill. He doesn't understand how this happened. Maybe the Town engineer should be partially responsible.

Mr. Ells commented that if it were that obvious a blunder, he's surprised no-one picked it up. If he had known, they could've redesigned the building.

Mr. Radkay said he could've made it up in his 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> floor ceilings.

Mr. McGuirk said people have asked him how he ever approved this project. And he tells them he didn't. He agrees with Mr. McQuade's concerns, but Mr. Radkay would've redesigned to conform. He can't imagine the problems that would be caused with the building down the road if we made him tear it off. The people aren't wrong with their concerns, but he can't imagine compromising the structure.

Mr. Jack Lessard said it's a mistake.

Mr. Ells said he thought final grade would get them close or under.

Mr. O'Brien said Mr. Radkay was informed in April and the membrane wasn't on at that time. He wouldn't want to disturb the membrane.

Mr. Shaw asked if he were denied, what would happen. Would he ask for a variance?

Mr. Radkay said the lighthouse goes away. It will become a square tower. The roof will have to be disturbed in the area of the elevator shaft.

Again, Mr. Ells said they can fix it if they have to. We have to decide tonight. We have contracts ready to close within a month.

Mr. McGuirk polled the Board on their acceptance that this petition meets the 4 criteria for granting an Equitable Waiver. Mr. Shaw, Mr. Provencal and Mr. McGuirk agree. Mr. O'Brien disagrees with item B, and Mr. Jack Lessard agrees with 3 out of 4.

Mr. Shaw MOVED to allow the Equitable Waiver, he doesn't agree with Mr. O'Brien, Mr. Lessard  
SECONDED.

VOTE: 4 For, 1 Oppo (BO)

PETITION GRANTED.

36-06 The petition of Barbara Costello Trustee for property located at 905 Ocean Boulevard seeking relief from Articles 1.3 and 4.5.2 to replace an existing deck with an attached garage (including a small kitchen enlargement). This property is located at Map 168, Lot 38 in a RA zone.

Atty. Bob Casassa and Mr. & Mrs. Costello are present for the petition.

Mr. Casassa explained that they are seeking 2 variances to expand the back of the house 6 feet and add a 2 car garage with a deck. The existing deck will be removed. The property is nonconforming as to its northerly side setback, 2.3 to 4.5 feet where 10 feet is required. He read through the 5 criteria as submitted with the petition. He said Mr. Cote is present to answer any questions he can. The proposal is narrower than the existing house.

*Questions from the Board:*

Mr. O'Brien clarified the plans.

*Comments from the Audience: None.*

*Back to the Board:*

Mr. Lessard reported that there's a letter in the file from the residents of 907 Ocean Boulevard supporting the petition.

Mr. O'Brien MOVED to grant the petition, SECONDED by Mr. Provencal.

VOTE: For 5, Oppo 0

PETITION GRANTED.

37-06 The petition of Elizabeth Arsenault for property located at 599 Ocean Boulevard seeking relief from Articles 2.3.4.B, 4.1.1, 8.2.1, 8.2.2, 8.2.3, 8.2.4 and 8.2.6 to allow existing building to be razed and new multi-family dwelling to be constructed. This property is located at Map 235, Lot 19 in a BS zone.

George Fredette came to the table to speak on this petition representing Ms. Arsenault. He said they would like to redevelop the property. It is zoned BS. Existing is a 3 level, 2 unit apartment building on 6828 square feet of land. This is an older building with a former garage at the rear. There are deficiencies in the building. The new building will be 3 levels of living space above a parking garage. There will be 5 parking spaces under the building and 5 at the rear. Ten spaces to accommodate 5 units. The variances are for setback from wetlands, density and open space, front setback and setback of parking and driveway from the building, and open space around the

perimeter. He read through the 5 criteria as submitted with his petition. This is a needed improvement, he said. They will meet many other criteria such as parking, side setbacks, and building height. Today the parking is in front and they back out onto Ocean Boulevard. Sewer, water and cable are existing. There will be more landscaping out front. The new construction will conform to the flood zone requirements. It will have a fire suppression and alarm system. The architectural appeal will be improved. The wetlands will be protected. Condos are very popular and desirable in Hampton, he said. There will be ample, safe and convenient parking and an encroachment will be corrected.

***Questions from the Board:***

Mr. Lessard asked if there will be a elevator. Mr. Fredette answered no right now.

Mr. Schultz said 4 or more units requires an elevator. Will it go outside the height? Asked Mr. Lessard.

Mr. Fredette said it's his intention to meet all building, ZBA and ADA codes (other than requested here). There is a provision on the plan for an elevator within the mechanical room on the ground level.

Discussion followed on the elevator location and different designs. Mr. Fredette said it will go right behind the emblem on the front of the building. Mr. Lessard said he will also need a sprinkler room and a mechanical room.

Mr. O'Brien is concerned with the lot sloping and the elevations and how he's going to determine the building height.

Mr. Fredette said he will stay under the 50 feet, right now he's at 45'3". Mr. O'Brien would feel better with the elevations being shown on the plan.

Mr. Fredette argued that he's not here for height. He double checked his figures after hearing the previous petition. He feels he's o.k.

Rusty Bridle, abutter, arrived at the meeting. His father's certified letter was returned. It went to Florida. Mr. Lessard offered him to speak. He said he's only concerned with the height right now.

The Board is concerned with the elevator and the elevations not being shown on the plan.

Mr. Schultz is concerned with the Board microanalyzing the plan. He's not here for a height variance. They need to address what's put before them.

Mr. Lessard said we're here to help people, not hurt them. We're doing him a favor.

Mr. Fredette asked the Board to include any requirements that they may have. It wouldn't be prudent to have a complete set of plans prior to approvals. Mr. Provencal agrees.

Mr. McGuirk MOVED to postpone the hearing to the next meeting for a more detailed plan showing the elevator and elevations, SECONDED by Mr. Shaw.

**VOTE: For 5, Oppo 0**

**PETITION POSTPONED.**

39-06 The petition of Douglas Bennett for property located at 497 Winnacunnet Road seeking relief from Articles 1.3, 2.3.4(B), 4.5.2, 4.5.3 and 8.2.3 to expand first floor deck and rebuild stairs. This property is located at Map 222, Lot 115 in a RB zone.

Robert and Doug Bennett came to the table to speak on the petition. Robert said they don't meet the side and rear setbacks. This building was built in the late 60's or early 70's. There is a 2 story deck already there. They need 5 more feet to put stairs to the second floor out far enough so that it doesn't effect the egress of the first floor unit.

He supplied a letter from DES stating they allow this type of upgrade without a hearing or special permit. He also had a certified plot plan in the file. They are no where near the high tide line, Doug said.

Doug Bennett said his tenants can't get furniture into the units and it's effecting his rental ability. When the storm doors are opened they hit the stairs to the second floor at the rear of the property. The fronts door are narrower than the rear doors.

*Questions from the Board: None.*

*Comments from the Audience: None.*

*Back to the Board:*

Mr. Shaw MOVED to grant the petition, with the condition that he meets approval of all required boards, SECONDED by Mr. Provencal.

The Chairman polled the Board on their agreement that this petition meets the 5 criteria. They all agreed.

VOTE: For 5, Oppo 0

PETITION GRANTED.

40-06 The petition of Public Service of New Hampshire for property located at 70 Timber Swamp Road seeking a Special Exception from Articles 1.3 and 16.1 to allow for construction a new Microwave Tower (150 feet in height) at the southwest corner of the new pad to be constructed as part of the expansion of the Timber Swamp Substation. PSNH proposes to remove an existing Microwave Tower (90 feet in height) located on the existing substation pad. The requested additional height of the proposed tower is required so that signal transmission can occur in a clear path above the tree line. This property is located at Map 102, Lot 2 in a RAA zone.

Walt Belynsky, Project Manager and Engineer, came to the table to speak on the petition. He said that they need to build a new tower 150' high. The existing one is 90 ' high. And they need to move it to the rear of the lot. This is a microwave tower they use to speak directly to the Seabrook Nuclear Plant and to Portsmouth's Shiller Station. He can't take the old one down until the new one is up and running. He described where it is going to go. You won't be able to see it from the road and probably from most all the abutter. If they see anything, it may be the top 10 feet. They need this tower to provide service. Because of the growing trees, more height is needed. They need a line of sight.

*Questions from the Board:*

Mr. Lessard asked how big the dish will be? Mr. Belynsky said he wasn't sure at this time because technology has changed.



Chuck Young, Ambit Engineering, read through the criteria for a Special Exception.

Mr. Shaw MOVED to grant the petition, SECONDED by Mr. Provencal.

The Chairman polled the Board on their agreement with the criteria. They all agreed.

VOTE: For 5, Oppo 0

PETITION GRANTED.

Mr. O'Brien MOVED to adjourn the meeting at 9:51 p.m., seconded by Mr. Provencal.

VOTE: For 5, Oppo 0

MOTION PASSES.  
MEETING ADJOURNED.

Respectfully submitted,

Angela L. Silva,  
Recording Secretary